MAR 30 1981
ALEXANDER L. STEVA
CLERK

No. 80-1149

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

GEORGE MARTIN, *et al*, *Petitioners*

VS.

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION

AND

CARRIE L. GRAVES, *et al*,

On Petition For A Writ Of Certiorari To
The United States Court Of Appeals
For The Fourth Circuit

PETITIONERS' REPLY TO INTERVENOR DEFENDANTS' BRIEF IN OPPOSITION

WHITEFORD S. BLAKENEY
Attorney for the Petitioners
and
Counsel of Record
3450 NCNB Plaza
Charlotte, North Carolina 28280
(704) 372-3680

Of Counsel:
BLAKENEY, ALEXANDER & MACHEN
Charlotte, North Carolina 28280

TABLE OF CONTENTS

		Page No.
I.	The Inaccuracy Of The Opposition Brief In Its Statement Of The First Question Presented -	1
II.	The Failure Of The Opposition Brief To Explain How A School Board's Exercise Of Discretion Can Be Immune To The Mandate Of Brown -	4
III.	The Failure Of The Opposition Brief To Perceive That The Petitioners' Seek Not To "Nullify" Swann, But Rely Instead Upon Obedience To Swann -	8
IV.	Miscellaneous Strange Contentions In The Opposition Brief -	11

PETITIONERS' REPLY TO THE INTERVENOR DEFENDANTS' BRIEF IN OPPOSITION

The Inaccuracy Of The Opposition Brief In Its Statement Of The First Question Presented

In opposing review of this case by this Court, the defendant intervenors[1] declare the first question "presented" to be - "whether" the defendant School Board had "discretionary" power to use "race as a factor in making pupil assignments".

While that might constitute an appropriate question in a different situation, it is not a question presented by this case. For the record in this case does not permit any hypothesis that "race" was merely "a factor" in the "making" of the

---

[1] It is to be noted that the defendant School Board is not opposing review of this case by this Court.

"pupil assignments" which are here in contest. Instead, "race" and the reachieving and maintaining of a precisely defined racial ratio in each school of the Charlotte-Mecklenburg sytem was indisputably the whole cause and reason for the pupil reassignment program which the Petitioners are challenging[1].

Among the thousands of pupils, black and white, who were compulsorily moved from one school to another under this reassignment program, neither the Courts below nor the defendant School Board nor the intervenor defendants have pointed to any instance in which such movement would have been compelled or ordered, had the race of the affected children been

---

[1] Petition, pp. 2-8.

different. Therefore, it is not only inappropriate, but misleading, to refer to "race" as "a factor" in this reassignment program.

The plain and undeniable truth is that the program was initiated and carried through for the explicit reason and purpose of rearranging the admixture of races in the various schools of the Charlotte-Mecklenburg system - and except for that reason and purpose would not have occurred. Race is indeed "what it was all about"[1], and the intervenor defendants' suggestion to the contrary has no support or justification.

---

[1] The defendant School Board's own written documents abundantly so demonstrate. Joint Appendix in the Court of Appeals, pp. 489-514.

II.
The Failure Of The Opposition Brief To Explain How A School Board's Exercise Of Discretion Can Be Immune To The Mandate Of Brown

In its statement of the first question "presented", the opposition brief espouses and puts forward the concept which the Court of Appeals adopted as its sole ground of decision in this case, namely, that the 1978 reassignment program is impervious to constitutional attack, because it was "independently formulated" by the defendant School Board in the exercise of its "discretionary powers"[1].

As to this proposition, the opposition brief ignores the Petition's outline of the overwhelming evidence in the record, demonstrating that in reality the School

---

[1] Opposition brief, pp. i, 3, 7, 9.

Board committed itself to make, and did make, the pupil reassignments here at issue - exactly to the racial ratio specifications which had been prescribed by the District Court - not "independently" and of its own "discretionary" choice, but because the Board full well realized that the District Court had previously required, and would again require, it to do so[1].

More importantly, however, the opposition brief offers no response whatever to the contention outlined in the Petition, that assignments and reassignments of public school pupils on a racial basis are not lawful and valid simply because a school board may have made or

---

[1] Joint Appendix in the Court of Appeals, pp. 93, 95, 96, 377, 378, 509-512, 513, 514.

adopted them in its "educational policy discretion"[1].

The defendants and the Court below have presented this "educational policy discretion" concept as sound and correct even if there be no Swann situation requiring "remedial" or "corrective" racial assignments. The Court of Appeals' decision obviously adopts this view in its ruling that "discretionary" decision on the part of the School Board, in favor of the program of racial reassignments here at issue, validates such program, regardless of whether it is or is not required to "remedy" or "correct" former unlawful racial assignments of opposite nature.

---

[1] Petition, pp. 18-21.

However, as the Petitioners have urged, Swann and Pasadena make it clear that such is not the law and that where a Swann situation does not exist - or no longer exists because of its having been remedied and corrected - then the fundamental mandate of Brown, namely, that assignments to public schools shall be "on a non-racial basis", comes again into full force and effect and bars all assigning or reassigning on a racial basis.

How can it be rationally deemed that a school board, by the exercise of an "educational policy discretion", can confer upon itself immunity to a constitutional precept which applies to all arms and agencies of both State and Federal Government, including the Courts

themselves[1]? The opposition brief makes no attempt to address this question - but surely the answer is obvious that, like the discretion or the decisions of any other governmental agency, a school board's "educational policy discretion" is in no way immune to the landmark mandate of Brown.

III.
The Failure Of The Opposition Brief To Perceive That The Petitioners' Seek Not "To Nullify" Swann, But Rely Instead Upon Obedience To Swann

The opposition brief says that this suit seeks "to nullify Swann". That, the Petitioners submit, is a thoroughly unjustified assertion. Precisely to the

---

[1] To say nothing of the fact that the Charlotte-Mecklenburg School Board is a creature of North Carolina Statutes, which expressly deny to it any such immunity. Petition, pp. 20-21.

contrary, this suit relies upon the proposition that in the Charlotte-Mecklenburg school system, Swann has been respected and obeyed[1].

The exactness and the completeness with which the "corrective" racial assignments and reassignments, directed by the District Court in 1974, were put into effect throughout the Charlotte-Mecklenburg public school system, is carefully set forth in the Petition[2] - as are the circumstances bearing upon the subsequent gradual development of variances in some schools from the racial ratio which the

---

[1] The opposition brief says, at its page 4, that "Petitioners have suggested incorrectly that Swann was dismissed in July 1975". On the contrary, the Petition, at page 5, recites precisely what the Swann record shows in this regard.

[2] Petition, pp. 3-5, 11-12.

District Court had prescribed for all schools[1].

Therefore, as forecast in Swann and ruled in Pasadena, the basic principle of Brown, as hereinabove emphasized, became reinstated and effective in the Charlotte-Mecklenburg school system. Consequently, repeated compulsory assignments and reassignments on the basis of race cannot continue to be imposed upon the Charlotte-Mecklenburg school children, under a misconception - steadily articulated by the District Court and apparently now accepted by the School Board - that the United States Constitution requires the Court and the Board to "maintain a continuing control over the race of children in each school,

---

[1] Petition, pp. 5-8, 13-16.

such as was done for many decades before Brown vs. Board of Education"[1].

This misconception, it must be noted, is studiously ignored in the opposition brief and is essentially the same as that enunicated by the District Court, and repudiated by this Court, in Pasadena.

IV.
Miscellaneous Strange Contentions In The Opposition Brief

The intervenor defendants seem to view critically, or condescendingly, the fact that "Plaintiffs in the instant case pleaded in their individual capacities; they did not claim to represent a class and did not seek to be certified as representative of a class"[2]. It is hardly,

---

[1] Petition, pp. 16-17.

[2] Brief in opposition, p. 3.

however, a badge of demerit that the Petitioners have seen fit to raise their claims of constitutional right directly and individually, rather than proceed through the indirections and ambiguities of an alleged "class" action.

Next, the opposition brief speaks deprecatingly of the fact that at the "evidentiary hearing" in this case, the plaintiffs did not testify, "and no live evidence was offered in their behalf"[1].

The plaintiffs were well aware, however, that the evidence ncessary to support their allegations would have to come - as it amply did in fact - from cross-examination of School Board members and School Board officials and staff

---

[1] Brief in opposition, p. 3.

personnel, and from School Board and other public documents and records, and from Court papers in the Swann case and in the present case. Since the record that was developed speaks for itself, it is difficult to perceive just what is the point that the opposition brief purports to make in this regard.

Further, along such vein, the opposition brief seems to take the position that the Petitioners have no case, because they "produced no evidence whatever of any injury or harm to themselves".

Yet the Complaint alleges that the plaintiffs' minor children, because of their race and color, have been uprooted from the schools which they otherwise would have attended, and have been compulsorily moved here and there among

the schools of the Charlotte-Mecklenburg system, and that under the further circumstances of this case, this was a violation of rights guaranteed to the plaintiffs by the United States Constitution. The plaintiffs have certainly "produced evidence" in support of these allegations.

Yet the opposition brief seems to be asserting that anything thus alleged or shown would still not establish "any injury or harm to" the plaintiffs. Does the opposition brief intend to be saying that violation of a citizen's constitutional right does not constitute "any injury or harm to" him?

Finally, the opposition brief declares that "Petitioners' reliance on Pasadena is entirely misplaced", because "there the plaintiff was the local school board itself

seeking relief from a district court order requiring further rearrangements of attendance zones after having fully complied with orders providing remedies for previously racially discriminatory attendance patterns", and that "in the instant case, however, previous racially discriminatory attendance patterns have never been remedied, and a unitary system achieved".

The opposition brief seems to overlook the fact that in Pasadena this Court said, as more fully quoted in the Petition, that:

> "It may well be that Petitioners have not yet totally achieved the unitary system contemplated by this quotation from Swann . . . But that does not undercut the force of the principle underlying the quoted

language from Swann"[1].

Moreover, in the present case, the Petitioners need not struggle with the generalities and uncertainties as to whether or when a "unitary system" has been achieved. For, in this case, the District Court made its requirements completely specific: - that blacks should be assigned to each school, but should not constitute more than 50 per cent of the student body in any school - and how many blacks and how many whites were to go from what schools and to what schools - and what would be the resulting numbrs and percentages of blacks and of whites in each school.

Likewise, in the present case, it cannot be denied, and is not denied, that

---

[1] Petition, p. 10.

the racial assignments and reassignments designated and specified by the District Court were put into effect in the Charlotte-Mecklenburg schools, and that the racial ratios prescribed by that Court were thereby brought about in each and all of these schools.

As to the opposition brief's emphasizing the fact that in Pasadena, "the plaintiff was the local school board itself seeking relief", it is difficult to discern what comfort the intervenor defendants derive from that circumstance, in comparison to the present situation.

For in the present case, the plaintiffs are themselves the possessors of the asserted constitutional rights, the violation of which is the basis of this action. In Pasadena, by contrast, the

plaintiff school board stood in lesser and derivative position with respect to the fundamental rights for which protection was sought. As emphasized by this Court in Shelley vs. Kraemer:

> "The rights created by the First Section of the Fourteenth Amendment are by its terms, guaranteed to the individual. The rights established are personal rights".
>
> Shelley vs. Kraemer, 334 U.S. 1, 22, 68 S.Ct. 836, 92 L.Ed 1161, 1185 (1948)

Upon all of the foregoing, the Petitioners respectfully renew their prayer for the issuance of a Writ of Certiorari in this case.

WHITEFORD S. BLAKENEY
Attorney for the Petitioners